

**DEPARTMENT OF STATE REVENUE**  
**LETTER OF FINDINGS NUMBER: 06-0469**  
**Sales and Use Tax**  
**For The Tax Period 2000 - 2005**

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**ISSUES**

**I. Sales and Use Tax – Imposition.**

**Authority:** IC § 6-2.5-2-1; IC § 6-2.5-1-2; IC § 6-2.5-4-1; IC § 6-2.5-5-17; IC § 6-8.1-5-1(b); 45 IAC 2.2-5-26; Sales Tax Information Bulletin 54 (August 1990); *Indiana Dep't of State Revenue v. Interstate Warehousing*, 783 N.E.2d 248 (Ind. 2003).

The Taxpayer protests the assessment of sales tax on certain publications that Taxpayer argues are similar to advertising supplements inserted in newspapers.

**II. Tax Administration – Imposition of Penalty.**

**Authority:** IC § 6-8.1-10-2.1; 45 IAC 15-11-2(b)(c).

The Taxpayer protests the imposition of the ten percent penalty.

**STATEMENT OF FACTS**

The Taxpayer is a corporation that provides graphic design services, including the publication of various promotional materials. In 2000, the Taxpayer began producing a publication for a local upscale clothing retailer. The Indiana Department of Revenue, hereinafter referred to as the "Department," assessed additional sales tax, use tax, interest, and penalty. The Taxpayer protested the assessment of sales tax on the publication and penalty. A hearing was held and this Letter of Findings results.

The Taxpayer began producing a publication for distribution to the patrons of a upscale clothing retailer. The publications contained life style articles, interviews, and advertisements. The publication also included a table of contents and masthead containing a statement of the volume

number, period it covered, and date of publication. The publications were printed on bound sheets of 8 ½ by 11 glossy paper. The publications were printed and distributed twice each year. The publication had the same name as the upscale clothing retailer. The publication's name included the word "magazine."

The Taxpayer produced this publication by contacting other upscale retailers to advertise. The local advertisers paid the Taxpayer directly for their advertisement. National advertisers gave the retailer a credit for new merchandise in the amount of the cost of the advertisement. The local clothing retailer then paid the Taxpayer for the advertising. For example, if the cost of the publication was \$1000, the local advertisers might pay \$200 directly to the Taxpayer. The local clothing retailer paid the remaining \$800 to the Taxpayer. The publication was distributed in the local clothing retailer's store and to the local clothing retailer's mailing list.

The Department considered the publications non-exempt and therefore subject to sales tax. The Taxpayer protested contending that it was actually selling advertising supplements similar to those inserted in newspapers which are exempt from the sales tax.

**I. Sales and Use Tax – Imposition.**

**DISCUSSION**

All tax assessments are presumed to be valid. IC § 6-8.1-5-1(b). The Taxpayer bears the burden of proving that any assessment is incorrect. *Id.* Exemption statutes are to be strictly construed against taxpayers. *Indiana Department of State Revenue v. Interstate Warehousing*, 783 N.E.2d 248, 250 (Ind. 2003).

IC § 6-2.5-2-1(a) imposes sales tax on retail transactions made in Indiana. A "retail transaction" is defined at IC § 6-2.5-1-2 as "selling at retail" as defined at IC § 6-2.5-4-1, or the transfer of tangible personal property for consideration in the retail merchant's regular course of business. An exemption from the sales tax is provided at IC § 6-2.5-5-17 for sales of newspapers. 45 IAC 2.2-5-26(d) exempts newspaper inserts. The exemptions application to the Taxpayer's situation was clarified in Sales Tax Information Bulletin 54 (August 1990) as follows:

Advertising inserts which are printed either by a newspaper or private printer and are distributed as part of a newspaper are exempt from sales and use tax in Indiana per [ IC §] 6-2.5-5-17. An advertising insert is advertising material that is incorporated into the newspaper or delivered in conjunction with the newspaper.

The Taxpayer's publications were delivered to the retail store for distribution in the store or to the store's mailing list. The publications were not incorporated into or delivered with a newspaper. Therefore the Taxpayer's publications are not exempt for sales tax purposes pursuant to IC § 6-2.5-5-17.

## **FINDING**

The Taxpayer's protest is respectfully denied.

## **II. Tax Administration - Ten Percent Negligence Penalty.**

### **DISCUSSION**

The Taxpayer protests the imposition of the ten percent negligence penalty pursuant to IC § 6-8.1-10-2.1. Indiana Regulation 45 IAC 15-11-2(b) clarifies the standard for the imposition of the negligence penalty as follows:

Negligence, on behalf of a taxpayer is defined as the failure to use such reasonable care, caution, or diligence as would be expected of an ordinary reasonable taxpayer. Negligence would result from a taxpayer's carelessness, thoughtlessness, disregard or inattention to duties placed upon the taxpayer by the Indiana Code or department regulations. Ignorance of the listed tax laws, rules and/or regulations is treated as negligence. Further, failure to read and follow instructions provided by the department is treated as negligence. Negligence shall be determined on a case by case basis according to the facts and circumstances of each taxpayer.

The standard for waiving the negligence penalty is given at 45 IAC 15-11-2(c) as follows:

The department shall waive the negligence penalty imposed under IC 6-8.1-10-1 if the taxpayer affirmatively establishes that the failure to file a return, pay the full amount of tax due, timely remit tax held in trust, or pay a deficiency was due to reasonable cause and not due to negligence. In order to establish reasonable cause, the taxpayer must demonstrate that it exercised ordinary business care and prudence in carrying out or failing to carry out a duty giving rise to the penalty imposed under this section. Factors which may be considered in determining reasonable cause include, but are not limited to:

- (1) the nature of the tax involved;
- (2) judicial precedents set by Indiana courts;
- (3) judicial precedents established in jurisdictions outside Indiana;
- (4) published department instructions, information bulletins, letters of findings, rulings, letters of advice, etc;
- (5) previous audits or letters of findings concerning the issue and taxpayer involved in the penalty assessment.

Reasonable cause is a fact sensitive question and thus will be dealt with according to the particular facts and circumstances of each case.

The Taxpayer provided substantial documentation to indicate that its failure to pay the assessed sales tax was due to reasonable cause rather than negligence.

**FINDING**

The Taxpayer's protest to the imposition of the penalty is sustained.

KMA/LS/DK- August 10, 2007